IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

Crl.MC.No. 3851 of 2005()

CC.394/2002 of JUDL.MAGISTRATE OF FIRST CLASS COURT, PAYYANNUR

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PETITIONER/ACCUSED:

SEEREVEETTIL ABDUL HAMEED,
S/O.ABOOBACKER,45/01,BEEVI ROAD,
PAYANGADI,KANNUR DISTRICT.

BY ADV. SRI.N.RADHAKRISHNAN

RESPONDENTS/COMPLAINTS:

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1. **STATE REPRESENTED BY THE PUBLIC PROSECUTOR,HIGH COURT OF KERALA.**

2. **REGINOLD,S/O.THEOPHIL, MAVEETTIL HOUSE,RAMATHALI AMSOM, KARANTHAT,KANNUR DISTRICT.**

BY PUBLIC PROSECUTOR SMT.M.R.PUSHPALATHA

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 10/10/2007,THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V.K.MOHANAN,J

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Crl.M.C.No.3851 of 2005

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Dated this the 10th day of October, 2007

ORDER

Petitioner is the sole accused in C.C.No.394/2002 pending before the Judicial First Class Magistrate Court, Payyannur. The second respondent herein is the de facto complainant. The prayer is to call for the records leading to C.C.No.394/2002 on the file of the Judicial First Class Magistrate Court Payyannur and to quash the same. It is also prayed for setting aside Annexure-A2 Charge Report and Annexure-A4 order dated 4.7.2005 of the court below.

2. The allegation against the petitioner is that he was entrusted with seven wooden windows on 5.5.2002 but the same were taken for his own use without the consent of the defacto complainant and thus the accused has committed the offence punishable under Section 406 of IPC. On the basis of the information furnished in Pazhayangadi Police Station, crime No.226/2001 was registered and after investigation, the police has filed Annexure-A2 final report before the court below, on the basis of which C.C.No.394/2002 was instituted. Annexure-A1 is the F.I.R in Crime No.226/01 of the Pazhayangadi Police Station.

Annexure-A2 is the final report and Annexure-A3 is the copy of the order of this Court in Crl.M.C.No.5846/2001 and Annexure-A4 is the proceedings dated 4.07.2005 of the Judicial First Class Magistrate Court, Payyannur. According to the petitioner, no offence under Section 406 of IPC is disclosed and therefore all the proceedings pending before the court below are liable to be quashed.

3. I have heard the learned counsel for the petitioner and also the learned public prosecutor.

4. The learned counsel appearing for the petitioner took me through the documents namely, Annexure-A1 to A4 and argued that no offence under Section 406 IPC is disclosed. There is no allegation disclosing the ingredients which are necessary for constituting the offence under Section 406 of IPC. According to the counsel, the dispute involved in this case is purely civil in nature and the same cannot be converted into criminal proceedings and therefore, Annexure-A2 report and all proceedings thereon are liable to be quashed.

5. The learned public prosecutor submitted that even going

by the report filed by the police after investigation, it is clear that the de facto complainant had entrusted 7 wooden windows with the petitioner/accused on 5.5.2002 and the accused had domain over the property which entrusted with him, but the same was taken by him for his own use against the specific instruction and thereby fraudulently misappropriated and therefore the petitioner's prayer cannot be allowed.

6. As per annexure A1 FIR and A2 report, the sum and substance of the allegations against the petitioner is that 7 wooden windows which were donated purportedly for the construction of the old age home being constructed by CW-1, brought from the house of CW-3 by Cws-1, 2 and 4 and petitioner/accused was entrusted with the same by CW-1 since there was no sufficient space to keep them in the house of CW1 and as directed by him, the same were kept in the verandah of the house of the petitioner. When CW1 went to the house of the petitioner on 18-4-2001 to take back the wooden widows, the petitioner/accused failed to return the same since in contravention of the terms of entrustment, he had sold out the same to somebody and thereby cheated CW-1 and accordingly the petitioner has committed offence punishable section 406 of IPC.

Going by the above allegation, this Court is of the view that the allegations contained in annexure A1 and A2 are sufficient to hold that a prosecution will lie against the petitioner for the offence under section 406 of IPC. On a reading of section 405 of IPC, what are essential to constitute an offence of criminal breach of trust are that there was an entrustment and the person, so entrusted, had domain over the property and such person has dishonestly misappropriated or converted it to his own use or destroys or dishonestly used that property in violation of the terms of the entrustment. These allegations are there but, of course, the same are subject to evidence. Though the petitioner has stated that no offence is disclosed, nothing brought out or no argument was advanced to substantiate such claim. Rather going by the Crl.M.C., it appears that his grievance is with respect to certain court proceedings initiated against him due to his laches. Apart from the above bald averments, nothing is pointed out so as to enable this court to exercise the power under section 482 Cr.P.C. to quash annexure A2 report and A4 order of the court below. The learned counsel appearing for the petitioner, relying on the decision reported in **Murari Lal Guptha v. Gopi Singh** {(2005) 13 SCC 699)}, submitted that in the present

case also petitioner is entitled to get the relief to quash annexure A2 complaint and all proceedings pending before the court below. In the above case, the facts involved are to the effect that according to the complainant in that case, the accused has a property in Delhi with respect to which he entered into an agreement to sell in favour of the respondent for a consideration of Rs.4.50 lakhs and Rs.3.50 lakhs was paid as advance. As per the agreement, the balance has to be paid at the time of registration of sale deed and delivery of possession. According to the respondent therein, the petitioner did not honour the agreement in spite of 3 legal notices and hence, a complaint was registered against the petitioner alleging cheating under section 420 of IPC. After examining the above complaint, the apex court has held that the criminal proceedings initiated by the respondent against the petitioner therein are wholly unwarranted and the complaint is an abuse of the process of the court and therefore proceedings are liable to be quashed. Even if all the averments made in the complaint are taken to be correct, according to the Apex Court, no offence under section 420 or 406 of IPC was disclosed. But in the present case, all the essential ingredients of section 406 of IPC are made out as disclosed by annexure A1 and A2 documents. There was

entrustment and the entrustment was for the purpose of keeping the wooden windows in the house of the petitioner as there was no sufficient space in the house of CW1. It is the further case that the wooden windows so entrusted were not returned, but the same were disposed of by the petitioner contrary to the terms of entrustment and sold the same for his own use.

7. Another decision relied on by the petitioner is **S.W.Palanitkar v.State of Bihar** {(2002) 1 SCC 241)}. In paragraph 20 of the above decision, the Apex Court has held:

> "....there is nothing either in the complaint and/or in the sworn statements of the complainant and the three witnesses that any property was entrusted to any of the appellants at all or the appellants had domain over any of the properties of respondent 2 which they dishonestly converted to their own use so as to satisfy the ingredients of section 405 of IPC punishable under section 406 IPC..."

In paragraph 8 of the very same judgment it is held:

> "....Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent

> misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in a civil court but a breach of trust with mens rea gives rise to a criminal prosecution as well".

Even on examining the facts and circumstances involved in the present case, in the light of the above decision, it can be seen that here there is entrustment and the petitioner has domain over the property, and the property was not returned in terms of the entrustment but the same were sold by the petitioner and disposed of the same in contravention of the terms of agreement. Therefore as per the allegation, an offence under section 406 of IPC is disclosed. Whether it was a civil wrong or criminal wrong with mens rea can be ascertained only at the time of evidence. At this stage, on examination of the available materials, it cannot be held that the petitioner has no mens rea at the time of commission of the alleged wrong.

8. The learned counsel appearing for the petitioner submitted that even if an offence under section 406 is disclosed; it is an offence which can be compounded. Whether the de facto complainant is prepared or not to compound the offence are not sure and uncertain at

this stage. If the parties to the proceedings in the court below are prepared to compound, certainly they can approach the court below with a petition under section 320 Cr.P.C. No doubt, if the court below is approached with a petition under section 320 Cr.P.C., the same will be considered and disposed of on merits. In the light of the above discussion, I am of the view that there is no merit in the Crl.M.C. and the same is dismissed, but subject to the observation made above.

V.K.MOHANAN, JUDGE

dvs/kvm